In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 311

EDWARD POOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. I, 35-37) is reported at 344 F.2d 943.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1965 (R. I, 38). A petition for rehearing was denied on June 1, 1965 (R. I, 39). The petition for a writ of certiorari was filed on July 1, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner effectively waived a jury trial pursuant to Rule 23(a), Federal Rules of Criminal Procedure.

RULE INVOLVED

Rule 23(a), F. R. Crim. P., provides:

> *Trial by jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT

Petitioner was charged in a four-count indictment returned in the United States District Court for the Southern District of California with the concealment and sale of two quantities of heroin in violation of 21 U.S.C. 174 (R. I, 2-5). Under an agreed stipulation of facts the court found petitioner guilty on all four counts (R. II, 99-100). Petitioner was sentenced to imprisonment for a total of ten years (R. I, 25). On appeal (R. I, 26-27) the conviction was affirmed (R. I, 38).

After the jury had been impaneled (R. II, 27-55), but before any evidence was presented, the following colloquy occurred in the court's chambers in the presence of petitioner, petitioner's counsel and government counsel (R. II, 96-97):

MR. MORROW (Government counsel): Your Honor, counsel for defendant approached me and would like to dispose of this case on a stipulated fact situation, and we will work through the morning and try and have the final stipulation of fact to you by early this afternoon.

MR. INGBER (Petitioner's counsel): It would be the desire of the defendant at this time to waive his right to trial by jury and to submit the matter to the court upon a stipulated set of facts, as the representative of the Government has indicated.

MR. MORROW: Your Honor, the Government will not consent to the waiver of the jury until the stipulation is drafted and signed.

MR. INGBER: At which point the waiver will then be effective. I merely want to indicate to the court that the jury perhaps need not be immediately tied up certainly for this morning.

* * * * *

THE COURT: Well, we can excuse the jury and tell them they are excused and to come back at 2:00 o'clock.

Prior to 2:00 p.m. on May 27, 1964 a written stipulation of facts, signed by government counsel, petitioner's counsel and by petitioner himself, was filed with the clerk and submitted to the court (R. I, 10-15). After reading the stipulation of facts the court found petitioner guilty on all four counts (R. II, 99-100).

ARGUMENT

The sole issue is whether petitioner waived a jury trial in writing pursuant to Rule 23(a), F. R. Crim.

P. There is no dispute that the district court approved, and the government consented to, the waiver.

Even if it be assumed, as petitioner argues, that execution of the jury trial waiver was mandatory under Rule 23(a), the courts below properly found a written waiver in this case. No specific form of written waiver is required. Before the stipulation of facts was signed by petitioner and his counsel, petitioner had heard government counsel announce that the government would not consent to the jury waiver sought by petitioner's counsel until the stipulation had been signed. Petitioner also had heard his own counsel say that at that time (*i.e.*, after the stipulation had been signed) the waiver would be effective. Consequently the court below could properly find that petitioner was well aware that his signature on the stipulation was an indication of his written intent that the trial court alone should decide the case under the stipulation, and that a jury trial should be waived.

In any event, petitioner has never contended that he failed to consent to the waiver, or that his consent was not given voluntarily and intelligently. Under such circumstances, he is properly held to the consequences of his deliberate and knowing action. Cf. *Horne* v. *United States*, 264 F.2d 40 (C.A. 5), certiorari denied, 360 U.S. 934; *Rogers* v. *United States*, 319 F.2d 5 (C.A. 7), certiorari denied, 375 U.S. 989.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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ROBERT G. MAYSACK,
Attorneys.

JULY 1965

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